of property have direct access, and they have reasonable access from the abutting property via the frontage road to the through-traffic lanes of the controlled access highway, the abutter's rights of access have not been taken or appropriated by the State Highway Commission, but merely subjected to regulation under the police power of the state, and their damages, if any, are noncompensable. In so holding, the Court followed the law of its decision in *Brock* v. *State Highway Commission*, 195 Kan. 361, 404 P.2d 934, where the Court defined the common-law right of access to a controlled access public highway as follows:

> "The common-law rules relating to rights of access were adopted for application to conventional highways such as land-service, farm-to-market and ordinary highways, to meet local transportation needs, as distinguished from interstate highways, freeways and other thoroughfares which were not then known and which require controlled access facilities for public safety and convenience.
>
> "The common-law rules relating to highway access rights were adaptable to circumstances and left to capacity for growth. The doctrine granting access rights to owners of abutting land as developed for conventional highways does not have the same application to controlled access thoroughfares.
>
> "Although an abutting landowner has a right to use a highway, he cannot be heard to say that he has been deprived of his right of access or compensably damaged because he does not have direct access to the through-traffic lanes of an access controlled highway where public judgment dictates that access to and from the highway should be controlled and is subject to control under the police power of the state.

> "Circuity of travel, necessarily and newly created, to and from real property, does not of itself result in legal impairment of the right of ingress and egress to and from such property and a controlled access highway.
>
> "An owner of land has no right to the continuation of a flow of traffic in front of his property from an access controlled thoroughfare and the state may abandon, reroute, or otherwise divert traffic without any liability to the owner of abutting lands."

What the Supreme Court of Kansas has done in the instant case and in the case of *Brock* v. *State Highway Commission*, supra, is to define the common-law property right of access to a controlled access highway in Kansas to be a right to reasonable, but not unregulated or unrestricted, access to the highway. The Court found on the facts of the instant case that petitioners have reasonable access to and from the public highway abutting their property, and therefore no property right under the law of Kansas has been taken. It is within the power of the highest court of a state to declare the common law of that state, and the definition of common-law state rules of property presents no federal question in a case where petitioners claim no rights under any federal law. This fundamental principle of federalism was expressed in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78, 82 L. Ed. 1188, 1194, 58 S. Ct. 817, wherein this Court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in the statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State

whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in Baltimore & O. R. Co. v. Baugh, 149 U.S. 368, 401, 37 L. ed. 772, 786, 13 S. Ct. 914, against ignoring the Ohio common law of fellow servant liability: '. . . But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.'"

This Court has held the decisions of the highest court of a state on matters of state substantive law to be conclusive upon this Court and other federal courts. *Huddleston v. Dwyer*, 322 U.S. 232, 88 L. Ed. 1246, 64 S. Ct. 1015; *Guarantee Trust Co. v. York*, 326 U.S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464.

Petitioners call attention to the diverse conclusions reached by the courts of the various states in access cases. They ask this Court, through exercise of its certiorari power, to end the variance in state court decisions. The certiorari jurisdiction of this Court does not exist to standardize the law of the various states on matters of local property rights not involving federal law.

Petitioners claim that respondent failed to exercise its statutory power to *acquire* access rights by gift, devise, purchase or condemnation (K.S.A. 68-1903) and apparently claim that failure of the respondent to acquire their access rights under this statute deprived them of a federal right. They ignore the interpretation of this state statute by the Kansas Supreme Court, which held that the statute in no way attempted to restrict the state's existing right to control access under the police power, but rather was intended to give authority to respondent to take rights of access in their entirety. *Brock* v. *State Highway Commission*, 195 Kan. 361, 369, 404 P.2d 934. They further ignore the fact that they continue to enjoy access to the highway abutting their property. Their access rights have not been taken in their entirety and their property landlocked. They have full access to the frontage road and access to the inner lanes of the highway via the frontage road, which the Kansas Supreme Court has held constitutes the extent of their property right of access. Petitioners refuse to acknowledge the clear distinction between a "taking" of property and the regulation of its use, and refuse to accept the state common-law definition of that property right as one of reasonable but not unregulated access to an abutting highway.

Petitioners further contend that they have been denied procedural due process because they have not been afforded an inquiry into the facts of this case. They ignore the fact that this action for the recovery of damages has been pending in the courts of Kansas for five years, they had full opportunity for discovery of facts and litigation of the issues under the civil procedure, their petition and admitted facts have been fully considered by the courts, and their claim found to be without merit.

II. The Police Power of a State Clearly Extends to the Regulation of Direct Access to a Controlled Access Highway by Affording Abutting Landowners Unlimited Access to a Frontage Road Adjacent to Their Property Which Connects to the Through, High-Speed Traffic Lanes at Points 155.56 Feet and 714 Feet from Their Property.

While the right of access is a property right under the law of Kansas, it, like all property rights, is subject to reasonable regulation in the interest of public safety. Reasonable regulation of the use of property under the police power is not conditional upon payment of compensation. This fundamental principle, stated in *Mugler* v. *Kansas*, 123 U.S. 623, 31 L. Ed. 205, 8 S. Ct. 273, was restated by this Court in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 593, 8 L. Ed. 2d 130, 133, 82 S. Ct. 987, as follows:

> "The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

The *Goldblatt* case goes on to state that regulation carried too far becomes a taking for which compensation must be paid. But surely the regulation of the right of access in the case at bar, which allows petitioners unlimited access to the highway lanes abutting their property, but limits petitioners' access to the inner, high-speed, through-traffic lanes via the frontage road to points only 155.56 feet and 714 feet from their property lines, does not go too far. Petitioners only must travel a more circuitous route to reach the inner lanes.

This exercise of police power is valid within the test stated in the *Goldblatt* case, wherein it is stated:

> "The classic statement of the rule in Lawton v. Steele, 152 U.S. 133, 137, 38 L. Ed. 385, 388, 14 S. Ct. 499 (1894), is still valid today:
>
> 'To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'" (l.c. page 594).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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